IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: NYALALI, C.J., MAKAME, J.A. and KISANGA, J.A.

CRIMINAL APPEAL NO. 32 OF 1986

GORDIAN PASTORY.....APPELLANT

and

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mwanza)(Bahati, J.) dated the 8th day of March, 1986

in

Criminal Sessions Case No. 103 of 1985

JUDGEMENT OF THE COURT

MAKAME, J.A.:

The appellant GORDIAN PASTROY was found to have murdered a person called GODWIN CHRISTOPHER. He was sentenced to death by the High Court sitting at Bukoba and he is now appealing against that decision by Bahati, J. Mr. Butamb[illegible]la, learned Counsel, appeared for him before us. For the respondent Republic Mr. Teendwa, learned State Attorney, began by supporting the High Court decision, but during the course of his submissions he conceded that the Republic's case was wanting.

There was an over-night wedding party at the house of one ERNEST PASTORY. Some time after midnight P.W.2 LEOPOLD POPE left the place in the company of a woman called REGINA who had a child with her. According to P.W.2, while they were at a house said to be some eighty yards from the wedding place, the appellant, who was with two other persons later charged with him but who were acquitted, arrived there and the appellant threatened to rape Regina. It is common ground that a fight ensued, during which the deceased, who had come to see what

the commotion was about, was himself assaulted. The doctor who examined his body found him to have sustained a fracture of the neck.

In convicting the appellant the learned trial judge relied mainly on the evidence of P.W.3 GREGORY CHRISTIAN, which he found was corroborated by that of P.W.4 FESTO CHRISTOPHER and P.W.1 KIIZA. The learned judge also felt himself fortified by the statements the appellant's co-accused had made to the Police in the course of investigations.

We have carefully re-visited the evidence on record and considered Mr. Butambala's submissions which we find to have merit. P.W.1 who had told the court that the appellant returned to the scene after the original fracas and that he saw him, the appellant, hitting the deceased with a stick, agreed, on being cross-examined, that he did tell the police that he never really witnessed the assault as he had gone off to call P.W.4.

We are of the view that P.W.3's testimony should have been examined and analysed with greater care. He is the one who said that when he was walking away from the scene with the deceased after a fight in which he intervened, he heard the noise of a stick, "pu", when he was bending down to do a shoe-lace. He ran towards the deceased, whom he found prostrate and wrigglin on the ground. The appellant was there and carrying a stick, and he ran away, but was apprehended by P.W.3 with the help of P.W.4 who had just arrived at the scene.

In his sworn evidence, the appellant did not deny being at the scene, and he said he first fought with P.W.2. A group of people then arrived and among them was the deceased. He fough with the deceased as well, and during that fight GREGORY, the star witness P.W.3, hit <u>him</u>, the appellant, with a stick.

It is on record that both P.W.3 and P.W.4 were trembling when they were testifying in court, which can be significant.

Quite obviously P.W.4 did not witness the alleged fatal assault and, as observed, P.W.1 did not really see the appella hitting the dece sed with a stic: despite his earlier assuranc The learned trial judge was satisfied that 'there are clear indications of lying here and there' and we are respectfully of the same view. We do not think that the appellant's conviction can be sustained on the evidence of P.W.1, P.W.3 and P.W.4, and Mr. Butambalais quite right that the statements by the appellant's co-accused cannot be taken against the appellant, considering their exculpatory nature.

We note that all the three assessors who assisted at the trial advised that the appellant was not Guilty.

We are unable to uphold the conviction. Consequently we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant should be released immediately, unless he is otherwise lawfully in custody.

DATED at MALAWA this 29th day of November, 1986.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KIKONGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. H. MSOFFE
DEPUTY REGISTRAR